

In contrast, respondent urges the Appeals Board to affirm the Administrative Law Judge's preliminary hearing Order that denied claimant's request for medical treatment for his alleged right shoulder injury. Respondent contends the greater weight of the evidence proves claimant's right shoulder injury was either caused or was permanently aggravated by a subsequent nonwork-related incident that occurred when claimant separated two fighting dogs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Appeals Board finds the Administrative Law Judge's preliminary hearing Order should be reversed.

The record in this matter consists of a preliminary hearing held on November 4, 1999, and a preliminary hearing held April 6, 2000. At the November 4, 1999, preliminary hearing, claimant requested medical treatment for an alleged right shoulder injury. The parties agreed, if the claim was compensable, orthopedic surgeon C. Craig Satterlee, M.D. of Kansas City, Missouri, would be the appropriate physician to provide the medical care. Claimant presented testimony and the medical treatment records of treating physician, Mekki M. Saba, M.D., were admitted into evidence. On November 5, 1999, the Administrative Law Judge issued the preliminary hearing Order that denied claimant's request for medical treatment. The Administrative Law Judge found a non-occupational event worsened his condition.

The second preliminary hearing was held on April 6, 2000. There was no testimony presented at this preliminary hearing. But the claimant again offered Dr. Saba's medical treatment records plus a December 6, 1999, letter from Dr. Saba expressing an opinion on causation. The Administrative Law Judge then entered the April 10, 2000, preliminary hearing Order, that is the subject of this appeal, that again denied claimant's request for medical treatment. The Administrative Law Judge found claimant's right shoulder was injured in a subsequent nonwork-related incident involving dogs.

On the date of claimant's accident, November 23, 1998, claimant was employed by the respondent as a truck driver. On that date, claimant delivered a truckload of frozen boxes of hamburger meat to a customer located in Owensboro, Kentucky. While unloading the boxes of hamburger meat, it was discovered that some of the boxes had fallen off the pallets located in the truck's trailer. Claimant testified he helped stack some of the meat boxes back on the pallets so the forklift could unload the truck. At the time he was lifting one of the meat boxes, he felt a pop in his right shoulder. He immediately experienced a sharp pain in his right shoulder.

Although in pain and having difficulty keeping his right arm on the steering wheel and shifting the gears, claimant made the return trip back to respondent's location in Fort Scott, Kansas, on November 25, 1998. When he arrived he notified the respondent of his right shoulder injury. The respondent told claimant that he could go to a physician of his choice for treatment. But claimant did not immediately seek medical treatment because he thought his right shoulder would improve without medical attention.

Claimant testified he was taking care of his sister's dog, on or about December 5, 1998, when his friend's dog started a fight with his sister's dog. Claimant attempted to reach down to break up the dog fight with his right arm, and at that time, he again felt the

same type of pain shoot through his right shoulder. Because of the severe pain, claimant did not pull the dogs apart with his hands, but separated the dogs by kicking them apart.

Before the dog fight incident, claimant had attempted to return to truck driving for a different employer. But he testified he had to quit that job because he was not physically able to drive the truck because of his right shoulder injury.

After the dog fight incident, claimant sought medical treatment for his right shoulder injury. He first saw Mekki M. Saba, M.D., of Fort Scott, Kansas, on December 7, 1998. Claimant provided Dr. Saba with a history of injuring his right shoulder while lifting boxes of hamburger on November 23, 1998. Claimant also described the dog fight incident that had occurred on December 5, 1998. Dr. Saba's diagnosis was rotator cuff tendon strain or chronic tendinitis or possible rotator cuff tendon tear, partial or complete.

Dr. Saba saw claimant again on December 14, 1998. Because claimant had not improved, the doctor placed claimant in a physical therapy program and ordered claimant to undergo a shoulder arthrogram. The arthrogram was completed on December 21, 1998, and found claimant with a large complete tear to the right rotator cuff. In a letter to claimant's attorney dated December 6, 1999, Dr. Saba opined:

" . . . I can state clearly his injury to the right shoulder 'Rotator Cuff Tendon Tear' is caused by his first accident at work & not caused by the attempt of separating fighting dogs, as the records shows no evidence of being injured at his attempt, he explained to me he was unable to use right shoulder."

Respondent, however, argues that claimant's testimony in reference to the dog fight incident should be interpreted that claimant used his right arm to separate the dogs during the fight and as he was separating the dogs, he felt a pop in his shoulder. The Appeals Board disagrees with the respondent's interpretation of claimant's testimony. The Appeals Board finds that claimant testified that he felt pain in his right shoulder as he was attempting to reach down to separate the dogs. He specifically testified he did not pull the dogs apart with his hands but instead kicked them apart.

The Appeals Board concludes that claimant's testimony, coupled with Dr. Saba's opinions as expressed in his December 6, 1999, letter, prove that it is more probably true than not that claimant suffered a right rotator cuff tendon tear while lifting the meat boxes for the respondent on November 23, 1998. The work-related torn rotator cuff injury was then exacerbated when claimant attempted to reach down and separate the fighting dogs. The Appeals Board concludes that reaching incident did not result in claimant suffering the right rotator cuff injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Steven J. Howard's April 10, 2000, preliminary hearing Order, should be, and is hereby, reversed and respondent is ordered to provide medical treatment

for claimant's torn right rotator cuff through orthopedic surgeon C. Craig Satterlee, M.D., of Kansas City, Missouri.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

c: Robert S. Tomassi, Pittsburg, Ks
Patrick S. Bishop, Fort Scott, KS
Derek R. Chappell, Ottawa, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director